No. 93-1286

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

AMERICAN AIRLINES, INC.,
Petitioner,
v.
MYRON WOLENS, ALBERT J. GALE, R. CRAIG ZAFIS, BRET MAXWELL, ROBERT NELSON and P.S. TUCKER,
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF *AMICUS CURIAE* OF AIR TRANSPORT ASSOCIATION OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Is a class action suit under state common law seeking damages for an alleged failure to make airline seats available to frequent flyers at a particular rate (free with frequent flyer credits) an effort by the State to enforce a law relating to the rates and services of an airline, and therefore pre-empted under 49 U.S.C. App. § 1305(a)(1) and this Court's decision in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992)?

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Air Transport Association of America ("ATA") is a non-profit unincorporated trade association of federally certificated air carriers providing scheduled passenger and cargo service. ATA's members account for more than 95 percent of the domestic passenger and cargo traffic flown annually by United States carriers.[1]

[1] ATA's members are: Alaska Airlines, Aloha Airlines, American Airlines, American Trans Air, Continental Airlines, Delta Air Lines, DHL Airways, Evergreen International, Federal Express, Hawaiian Airlines, Northwest Airlines, Reeve Aleutian Airways, Southwest Airlines, Trans World Airlines, United Air Lines, United Parcel Services, and USAir. Associate members are Air Canada, Canadian Airlines International, and KLM Royal Dutch Airlines.

This brief is filed with the consent of the parties. The consent letters have been filed with the Clerk.

ATA's principal functions are to represent the interests of the commercial airline industry before Congress, state legislatures, and federal and state courts. ATA also works closely with the various federal agencies which regulate the airline industry, such as the Federal Aviation Administration and the Department of Transportation. ATA has filed numerous *amicus* briefs in federal and state court proceedings concerning a wide variety of issues of interest to its members.

ATA's members have a vital interest in the outcome of this case, which has far-reaching consequences to the airline industry. Almost all of ATA's passenger airline members have a frequent flyer award program similar to the award program offered by American Airlines. Indeed, this suit against American Airlines is only one of more than five such suits which have been brought against airlines in the Circuit Court of Cook County, Illinois, challenging changes in frequent flyer programs.

Each airline's frequent flyer program may differ in certain respects from the programs of other airlines, and changes in one airline's program may be made at different times, in a different manner, and for different reasons than changes in the programs of other airlines. ATA, in light of its experience and perspective, is particularly qualified to bring to the attention of the Court the industry-wide significance of frequent flyer programs, to explain the role these highly successful programs play in airline marketing, and to detail the manner in which these programs relate to "the dynamics of the air transportation industry," which this Court found significant in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2040 (1992).

The decision below—if allowed to stand—would preclude airlines from administering frequent flyer programs with the flexibility necessary in a competitive market with

the characteristics of the air transportation industry, in direct conflict with Congress' pre-emption of state laws "relating to rates, routes, or services." 49 U.S.C. App. § 1305(a)(1). Frequent flyer programs—progeny of Congress' decision to infuse free market competition into the United States airline industry—would be radically modified or terminated, to the detriment of the industry and the public. ATA and its members—as well as the passengers they serve—have a strong interest in avoiding any such result, and ensuring that courts correctly interpret and apply Section 1305(a)(1).

ATA and its members also have a strong interest in preserving the certainty and clarity of the regulatory regime under which air carriers operate. This Court in *Morales* contributed to that certainty and clarity by reading the pre-emption clause of Section 1305(a)(1) as written. The decision below threatens to unsettle that clarity, on which the airlines have relied.

STATEMENT OF THE CASE

The facts are set forth fully in petitioner's statement of the case, and ATA will not repeat them here. We note, however—and we file this brief to demonstrate—that the significance of this case extends far beyond the particular parties. Although the Illinois Supreme Court concluded that a "frequent flyer program is not an essential element to the operation of an airline," Pet. App. 6a, the fact is that all major domestic carriers have frequent flyer programs, and those programs are a significant part of the rate and service structure of today's air transport industry. Indeed, as explained below, they are a prime device for marketing the rates and services of one airline as against its competitors and constitute one of the most creative competitive innovations of the post-deregulation era.

The programs differ in various respects, and are constantly changing as particular airlines respond to a com-

petitive environment and seek to gain an advantage over their domestic and international rivals. As petitioner American Airlines did in this case, other carriers have modified the benefits and restrictions in their frequent flyer programs from time to time, to ensure continued viability of the programs consistent with the yield management approach that forms the core of effective competition in the modern air transport industry.

This case is of broad significance beyond the parties not only because of the importance and prevalence of frequent flyer programs, but also because it is a nationwide class action brought under state law to challenge the practices of an air carrier engaged in air transport services throughout the country. The effect of such a suit is tantamount to broad regulation of the relations between an airline and its customers under state law—precisely the result forbidden by the Airline Deregulation Act's express pre-emption of all state laws "relating to rates, routes, or services." 49 U.S.C. App. § 1305(a)(1). This case is of particular interest to ATA because the decision below—if allowed to stand—will interfere with competition among ATA members over frequent flyer programs, and deprive ATA members of the flexibility they need to administer yield management programs in a cost-effective manner. Both of these consequences will seriously inhibit the competitive market Congress sought to foster when it enacted the Airline Deregulation Act.

SUMMARY OF ARGUMENT

The express pre-emption clause of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1), is expansive in scope and unambiguous in meaning: "[N]o State * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services" of any interstate air carrier. Just two years ago in *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992), this Court concluded that this provision should

be read as written, holding that state enforcement actions "having a connection with or reference to airline 'rates, routes, or services' are pre-empted." Respondents seek to enforce in state court an alleged right to certain airline services (air travel) at a particular rate (free, with frequent flyer credits). This attempt clearly relates to rates and services, and is accordingly pre-empted.

The conclusion of the majority below that frequent flyer programs are "peripheral to the operation of an airline" and "only tenuously connected to the airlines' rates, routes, and services" (Pet. App. 7a) is palpably untrue. Frequent flyer programs—one of the leading creative innovations of the deregulation era—are an integral part of the way airlines market their services. As might be expected given the important role such programs play, airlines compete intensely with each other over the terms of their frequent flyer programs, and the marketplace imposes serious restrictions on any airline's ability to alter frequent flyer benefits. In fact, the competitive marketplace has generally driven air carriers greatly to expand the benefits they offer frequent flyers.

Respondents' assertion that they have a right enforceable under state law to use their frequent flyer credits for any seat on any flight would—if upheld—directly affect rates and services by undermining the yield management process through which airlines achieve the most economically efficient mix of full fare, discount fare, and frequent flyer seats on any particular flight. This Court explained the importance of this process in *Morales*, noting that the economics of the air transport industry required restrictions on the availability of lower fare seats to increase the prospects of a profitable flight. *See* 112 S. Ct. at 2040. Frequent flyer seats are the lowest of the lower fare seats, and restrictions on their availability—evolving over time in response to changing competitive conditions—are critical to the manner in which air carriers set the rates for their services. State law actions that seek to

limit this flexibility are plainly related to the carriers' rates and services, and are therefore pre-empted.

The air transport industry plays a critical role in our Nation's economy, not only because of its own contribution but because of its ties to the aerospace manufacturing and tourism industries and its role in linking other segments of the domestic and international marketplace. The industry is currently facing an unprecedented economic crisis, having lost some $12.8 billion over the past four years. Opening the industry to massive new and unforeseen liabilities under state law through actions of the sort at issue here would be devastating not only to the air transport industry but to all the other segments of the economy inextricably linked to it. In expressly providing that all state laws relating to rates, routes, or services are pre-empted, Congress ensured that the industry would not be subjected to such liability. This Court confirmed that understanding in *Morales*, and should reaffirm it here.

ARGUMENT

I. THE AIRLINE DEREGULATION ACT PRE-EMPTS STATE REGULATION OF FREQUENT FLYER PROGRAMS

The Airline Deregulation Act contains an express pre-emption provision specifying that "no State * * * shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of" any interstate air carrier. 49 U.S.C. App. § 1305(a)(1). In *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031 (1992), this Court held that this provision means what it says, concluding that state enforcement actions "having a connection with or reference to airline 'rates, routes, or services' are pre-empted." *Id.* at 2037.

Here respondents' state court action seeks to enforce an alleged contractual right under Illinois common law to use frequent flyer credits in a particular manner for free

flights. The respondents claim an entitlement to a particular airline "service"—air transportation—at a particular "rate"—free with frequent flyer credits. Their suit plainly has "a connection with or reference to airline 'rates [and] services,' " and accordingly is pre-empted.

Under *Morales* and the Act, that is the end of the matter. There is no avoiding the pre-emptive effect of Section 1305(a)(1) by arguing—as the State attempted to do in *Morales*—that the state court action is not inconsistent with federal law. Such an approach would be pertinent if the issue presented concerned *conflict* pre-emption, *i.e.*, the displacement of state law because it conflicts with federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). But that is not what is at issue here. This is a case of express pre-emption, and all that need be shown is that the state law has "a connection with or reference to" rates and services.

Certainly many if not most cases of express pre-emption involve situations in which state regulation conflicts with federal law, which presumably was the reason Congress enacted the express pre-emption provision in the first place. But it is not necessary to show such a conflict when the express pre-emption provision applies, and the absence of a conflict can hardly override the plain import of the statutory pre-emptive language enacted by Congress. As the *Morales* Court explained in rejecting the State's argument that its contemplated action was consistent with federal law, that issue "is beside the point. Nothing in the language of § 1305(a)(1) suggests that its 'relating to' pre-emption is limited to *inconsistent* state regulation." 112 S. Ct. at 2038 (emphasis in original).

This Court in *Morales* did note, in *dicta*, that " '[s]ome state actions may affect [airline fares] in too tenuous, remote, or peripheral a manner' to have pre-emptive effect." *Id.* at 2040 (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463

U.S. 85, 100 n.21 (1983) (bracketed language in original)). That possible limitation on the scope of Section 1305(a)(1) is plainly not applicable in this case, since respondents' action seeks to enforce alleged rights to particular services at particular rates. The connection to services and rates is direct, not tenuous and remote.

That point is confirmed by the following analysis of the role frequent flyer programs play in the air transport industry. It is important to note, however, that this analysis of the actual impact of the state regulation at issue is pertinent only in considering the possible remoteness limitation adverted to in *dicta* in *Morales*. The question is not whether state law is consistent with federal law, but rather whether the state regulation affects airline rates and services in so "tenuous, remote, or peripheral a manner" that the regulation cannot even be said to have "a connection with or reference to" the rates and services. *Morales*, 112 S. Ct. at 2037.

II. STATE REGULATION OF FREQUENT FLYER PROGRAMS RELATES TO AIRLINE RATES AND SERVICES

A. Airlines Market Their Services And Compete Through Frequent Flyer Programs

This Court in *Morales* explained that pre-emption under Section 1305(a)(1) applies to state laws which "have a significant impact upon the airlines' ability to market their product." 112 S. Ct. at 2040. The contrast with the analysis of the Illinois Supreme Court could not be clearer. That court declined to find pre-emption because a "frequent flyer program is not an essential element to the operation of an airline." Pet. App. 6a. This "essential element" test has no logical bearing on whether a state law "relat[es] to rates, routes, or services"—the statutory language. A ten percent discount offered by an airline for weekend travel may not be "essential" to the operation of the airline, but it is clear that a state law purporting to regulate such a discount program would

nonetheless be pre-empted as "relating" to the airline's rates and services.

In any event, the Illinois Supreme Court's view that frequent flyer programs are "peripheral to the operation of an airline" and "only tenuously connected to the airlines' rates, routes, and services" (Pet. App. 7a) is demonstrably false and not shared by the federal agency responsible for administering the Deregulation Act. The Department of Transportation has concluded:

> To be a successful competitor in today's airline industry, an air carrier must differentiate its service and develop incentives that reduce the need to rely on price competition. Frequent flyer programs are one of the most effective marketing practices yet devised for differentiating airline services and appealing directly to the traveler, who, in many instances, is different from the purchaser of the ticket. [Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Airline Marketing Practices* (Feb. 1990), at 31.]

This conclusion—that "[f]requent flyer programs are one of the most effective marketing practices yet devised"—directly answers this Court's test in *Morales* that state laws are pre-empted if they "have a significant impact on the airlines' ability to market their product." 112 S. Ct. at 2040.

The Secretary's Task Force further explained that "[i]n interviews with airline executives, travel agents, and corporate travel managers, it has been acknowledged that frequent flyer membership has a powerful effect on air carrier selection." *Airline Marketing Practices, supra*, at 41. *See also* Ian Brown, The Loyal Family, *Airline Business: The Skies in 1994* 20, 21 (1994) ("Surveys have repeatedly shown that passengers take FFP [frequent flyer program] considerations into account when choosing flights and airlines"). Thus—although "essentiality" is plainly not the appropriate test—a frequent flyer program

may well be essential for many carriers to compete effectively in today's market for air travel consumers. *See id.* at 23 (managing director of Cathay Pacific quoted as saying "A mileage programme is essential if we are to have a competitive product").

In fact, airlines compete intensely over the terms of their respective frequent flyer programs. This competition dates from the first introduction of a frequent flyer program by American Airlines in May 1981. By July 1981, all of the other major domestic airlines had responded by offering competing programs of their own. This pattern was replicated internationally. European carriers generally did not offer free flights to frequent flyers until shortly after United States carriers gained access to London Heathrow slots in 1990. British Airways then promptly responded to this competition by offering a program with free flights, and other European carriers responded to the British Airways' initiative. *Id.* at 20.

Indeed, frequent flyer programs are such a major component of how airlines compete that there are even regularly published newsletters and journals such as *Business Flyer* and *Frequent* (now known as *Inside Flyer*) devoted to keeping consumers apprised of changes in frequent flyer programs and the comparative strengths and weaknesses of programs offered by different airlines. The monthly magazine *Frequent Flyer* also contains a regular department devoted to frequent flyer programs, and carries advertisements from airlines publicizing their programs. *See, e.g., Frequent Flyer* (June 1994), at 21, 64.

Recent articles in *Frequent* include "The Battle for California" (June 1990, p. 9), detailing the competing bonus mile programs offered by American, Delta, United, and USAir to attract customers on the Los Angeles—San Francisco route; "Air Wars 2 (Battle Review)" (March 1990, p. 3), describing one airline's offer of double or triple miles usable for a more extended period of time than allowed under competitors' programs; and "Continued Evolution of Elite Level Programs" (Jan. 1990, p. 2), noting that "elite level programs became a battleground" and that new programs by certain airlines "will force others * * * to go back and review their benefit program."

Regular features in the magazine include "Partners," listing which airlines have linked with others in frequent flyer programs, and "Bonus Bulletin," listing special promotions offered by the airlines to their frequent flyers for limited times. The magazine even conducts an annual awards program, bestowing "Freddies" in categories for best customer service, best overall award, best overall promotion, best affinity credit card, best program newsletter, best elite level program, and best frequent flyer program. *See Frequent* (Jan. 1990, at 1, 20). *Frequent* also publishes the *Official Frequent Flyer Guidebook*, with comprehensive information about the competing programs.

Significantly, among the issues discussed in *Frequent*—by both reporters and readers writing letters to the editor—are limits imposed by the airlines on redemption of frequent flyer miles. Letters tout one program's mileage awards "free of capacity control for 'Gold' members with no extra mileage" (April 1990, p. 2); an article on capacity controls reviews different programs and advises frequent flyers that "[i]f you continue to have problems with your award destination, consider flying another airline * * *. Remember, you do have choices" (March 1990, pp. 1, 20).

This intense competition has resulted in an overall expansion of benefits under frequent flyer programs, with airlines extending originally limited periods for the redemption of awards; offering enhanced opportunities to earn mileage credits through hotel, auto rental, telephone, and general credit card purchases; and broadening not only opportunities to earn miles but also redemption possibilities through affiliation with other, especially international, air carriers. The Department of Transportation recog-

nized this in 1992, when it rejected a petition seeking a rulemaking addressed to frequent flyer programs. As the Department noted, "[s]ince the programs began, each carrier has greatly expanded the kinds of awards that members can obtain and the ways in which members can accumulate award miles in order to make its program more attractive." Pet. App. 99a.

The airlines thus face significant competitive pressures in the marketplace which restrict their ability to modify frequent flyer programs. Carriers recognize that excessive restrictions will be noted by their most frequent flyers, may well be widely publicized, and could result in loss of customer loyalty to rival airlines.

The foregoing makes clear that the terms of an airline's frequent flyer program are an integral part of that airline's "rates" and "services". State court actions seeking to regulate airline practices with respect to frequent flyer programs therefore plainly "relat[e] to rates, routes, or services" and are pre-empted by the plain language of Section 1305(a)(1). As Congress intended, the competitive market established by the Deregulation Act—not the States—regulates this aspect of airline rates and services.

It is also clear that state regulation is inconsistent with the purposes of the Deregulation Act, because the state action directly implicates competition among the airlines and the pro-competitive policies of the Act. A state effort to raise or lower airline rates would indisputably be barred by the express pre-emption clause, and would hinder competition among various carriers on the basis of fares. But airlines compete just as vigorously through their frequent flyer programs, and any state effort to regulate those programs similarly hinders competition. Indeed, competition through frequent flyer programs may often be more effective for airlines, because it entails less risk than an across-the-board reduction in fares and carries with it the added advantage of rewarding and solidifying customer loyalty.

B. The Airlines' Yield Management System For Setting Rates Under Deregulation Requires Flexibility In Frequent Flyer Programs

Respondents' state law claims have another effect on airline rates and services, quite apart from affecting competition over frequent flyer programs themselves. In fact, the attempted state regulation in this case goes to the core of how the airlines compete in the deregulated marketplace established by the Act.

To appreciate fully the impact the decision below will have on airline rates and services, it is necessary to understand "the dynamics of the air transportation industry." *Morales*, 112 S. Ct. at 2040. As this Court explained:

> The expenses involved in operating an airline flight are almost entirely fixed costs; they increase very little with each additional passenger. The market for these flights is divided between consumers whose volume of purchases is relatively insensitive to price (primarily business travelers) and consumers whose demand is very price sensitive indeed (primarily pleasure travelers). Accordingly, airlines try to sell as many seats per flight as possible at higher prices to the first group, and then to fill up the flight by selling seats at much lower prices to the second group (since almost all the costs are fixed, even a passenger paying far below average cost is preferable to an empty seat). [*Id.*]

The Court went on to recognize that "substantial restrictions on the availability of the lower priced seats (so as to sell as many seats as possible at the higher rate)" were necessary in order for this pricing system to function. *Id.*

Frequent flyer tickets are, of course, the lowest of the lower priced seats. Without the ability to impose restrictions on the availability of seats for frequent flyers, the complex and sophisticated revenue management systems employed by every air carrier—systems the Department of Transportation has recognized as "pro-competitive," *see*

Secretary's Task Force on Competition in the U.S. Domestic Airline Industry, *Pricing* 188-189 (Feb. 1990) —could not function.

This requisite flexibility is completely incompatible with the regulatory regime respondents seek to impose under Illinois common law. American Airlines' frequent flyer brochure expressly stated that "program rules, regulations, travel awards and special offers are subject to change without notice." *See* Pet. Br. 8 & n.13. Respondents nevertheless insist on more detailed disclosure—precisely the sort of disclosure that cannot be made because of the fluidity of the yield management process in today's competitive environment. An air carrier simply cannot know in advance how developing competition will change the mix of full fare, discount fare, and frequent flyer seats that will maximize revenue on a particular flight; how long seats should be set aside for business travelers on a particular route before being opened up for additional frequent flyer travelers; or what the availability of frequent flyer seats will be on new routes it may offer in the future. As the Federal Circuit recently explained:

> [T]o respond to a changing market the airlines may limit the number of tickets available at a particular applicable fare. The airline designates a number of "available seats" to be sold at each applicable fare for a given service and this number fluctuates on an hour-by-hour, or sometimes a minute-by-minute, basis. [*Alaska Airlines, Inc.* v. *Johnson*, 8 F.3d 791, 793 (Fed. Cir. 1993).]

In addition, if Illinois may regulate rates and services through common law actions of the sort at issue here, then so may any and every other State. Airlines would face a chaotic patchwork of different and even conflicting regulation. Requiring compliance with 50 different common law advance disclosure rules, which themselves evolve over time, would seriously distort the yield management process and directly inhibit the ability of air carriers to compete in a cost-effective manner.

Respondents' assertion that they have a legally enforceable "right" to use frequent flyer credits to purchase "any seat" on "any flight" would confer a special status on frequent flyer fares not accorded any other fare. Thus, an airline may advertise a discount fare for a particular flight, but that does not confer a "right" on any consumer to "any seat" on that flight at that price. Rather, as shown, the extent of the availability of the discount fare seats depends upon the yield management process for that flight. This Court has already held in *Morales* that state efforts to regulate the disclosure of limitations required in connection with the marketing of such discount fares are pre-empted by Section 1305(a)(1); a different result should not obtain with respect to the marketing of a specific type of fare—a frequent flyer fare—through the promotional materials of the frequent flyer program.

III. THE DECISION BELOW, IF ALLOWED TO STAND, WOULD HAVE A DRAMATIC ADVERSE FINANCIAL IMPACT ON THE AIR TRANSPORT INDUSTRY

In its Report to the President and Congress ("Report") issued in August 1993, the National Commission to Ensure a Strong Competitive Airline Industry concluded:

> This nation's civil aviation system is a vital national resource. * * * The air transportation system has become essential to economic progress for the citizens and businesses of this nation. Without it, our country will be hamstrung in its ability to participate in an increasingly global community and marketplace. [Report, *Change, Challenge, and Competition: A Report to the President and Congress*, at 1.]

In establishing the Commission, Congress itself found that "[t]he Nation's airlines provide our connections with the global economy. A strong airline industry is essential to our Nation's ability to compete in the international

marketplace." Airport and Airway Safety, Capacity, Noise Improvement, and Intermodal Transportation Act of 1992, Pub. L. No. 102-581, § 204(a)(2), 49 U.S.C. App. § 1371 note. The importance of the air transport industry derives not only from the 550,000 people it employs directly, but also from its critical ties to the aerospace manufacturing and tourism industries, and its role linking other sectors of the economy, both domestically and internationally. *See* Report, at 5 ("The Economic Impact of Aviation").

Congress in establishing the Commission, and the Commission in its Report, recognized that the airline industry is currently confronting a serious economic crisis, one with profound implications for the Nation's economy as a whole. In the past four years, the industry has lost some $12.8 billion—more than twice what it earned since the beginning of scheduled airline service in 1925. As Congress found, "[t]he Nation's airlines are in a state of financial distress," endangering their ability "to accommodate the growing aviation traffic demands of the 1990's which threaten to undermine our Nation's ability to compete in the global economy." Pub. L. No. 102-581, *supra*, § 204(a)(3). *See* Report, at 12.

Against this background, the decision below threatens to saddle the industry with enormous new unforeseen liabilities. In addition, if the airlines are forced to abandon yield management restrictions for frequent flyer seats, or lose the flexibility to revise frequent flyer benefits in response to competitive pressures, the ability to earn an adequate return on flights may well be lost.

Our point is not, of course, that the airlines should be free from this liability simply because it would be costly for them and in turn for the economy as a whole. It is instead that Congress—sensitive to the vital role a healthy airline industry plays in our economy—has already expressly provided that the airlines not be subject to the prospect of this sort of liability when it passed Section

1305(a)(1). By pre-empting *any* state law "relating to rates, routes, or services," Congress ensured that an air carrier's liability for these aspects of its business would be set by the competitive marketplace—which makes the carrier pay through business and revenue lost to its rivals —or by the Federal Government—which can appropriately weigh the vital role of the industry and its economic health in proceeding with any appropriate remedial action.

CONCLUSION

For the foregoing reasons, and those in petitioner's brief, the judgment below should be reversed.

Respectfully submitted,

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